

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Petition	)	Application No. C-2925
for Declaratory Ruling of	)	
Lincoln Electric System, seeking	)	
a determination that Title 291,	)	
Chapter 5, Telecommunications	)	
Rules and Regulations, Sections	)	
001, 002 and 003, as amended and	)	
enacted March 31, 2003,	)	ORDER ISSUING
governing telecommunications	)	DECLARATORY RULING
contract carriers, shall not be	)	
applied retroactively to the	)	
Application of Lincoln Electric	)	
System for Contract Carrier	)	
Permit Authority (Application	)	
No. C-2910) filed March 27,	)	
2003.	)	Entered: August 19, 2003

BY THE COMMISSION:

On March 27, 2003, Lincoln Electric System (LES) filed with the Nebraska Public Service Commission (Commission) an application for Contract Carrier Permit Authority. On April 16, 2003, LES filed a Petition for Declaratory Ruling seeking a determination that Title 291, Chapter 5, Telecommunications Rules and Regulations, Sections 001, 002 and 003, as amended and enacted March 31, 2003, governing telecommunications contract carriers, shall not be applied retroactively to the Application of Lincoln Electric System for Contract Carrier Permit Authority (Application No. C-2910) filed March 27, 2003. LES subsequently filed, on June 27, 2003, a Memorandum in Support of its Petition for Declaratory Ruling.

On July 18, 2003, the Nebraska Telecommunications Association (NTA) and Nebraska Cable Communications Association (NCCA) filed a Response Memorandum in regards to the LES Petition for Declaratory Ruling.

In light of the petition and subsequent memorandums, the Commission held an oral argument on August 5, 2003, in the Commission Hearing Room. Appearances were made as follows: Mark Ayotte, Doug Curry and William Austin on behalf of LES; Jack Shultz on behalf of the NTA and NCCA; Paul Schudel on behalf of ALLTEL Nebraska, Inc. (ALLTEL); and Chris A. Post on behalf of the Commission.

Essentially, LES challenges the applicability of five provisions of the Commission's recently approved Contract Carrier Rules. They are as follows:

1. Rule 001.02 - prohibiting an agency or political subdivision of the State from providing telecommunications services;

2. Rule 002.26A - prohibiting a contract carrier's sale or transfer of telecommunications assets or a controlling interest in the company without Commission approval and issuance of a new permit;

3. Rule 003.18 - imposing service quality rules on a contract carrier for the provision of local exchange telecommunication service;

4. Rule 003.22 - limiting a contract carrier to one (1) permit under which it may serve no more than five (5) customers; and

5. Rule 002.49B1 - imposing a "public interest" standard on a contract carrier applicant.

As a result of the oral arguments, it is clear that the Commission must provide additional direction to the parties in this proceeding in order for the application to be processed in an efficient and timely manner.

Therefore, the Commission hereby declares that with the exceptions specifically noted below, the Commission will apply the requirements set forth in the recently enacted rules governing telecommunications contract carriers ("Contract Carrier Rules"<sup>1</sup>) to the application of Lincoln Electric System for contract carrier permit authority filed with the Commission on March 27, 2003.<sup>2</sup>

LES argues that Rules 001.02, 002.26A, 003.18, 003.22 and 002.49B1 are technically unenforceable as official rules and regulations. However, it is important to recognize that the Nebraska Legislature authorized the Commission to create requirements beyond what the Commission adopts as rules and regulations. According to Neb. Rev. Stat. § 86-128(3),

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<sup>1</sup> Neb. Admin. Code, tit. 291, ch. 5.

<sup>2</sup> Application No. C-2910.

The commission may adopt and promulgate rules, regulations, **and requirements** . . . as the commission deems necessary or desirable and in the public interest. (Emphasis added.)

As a result of this directive, the Commission adopted the necessary conditions and requirements to appropriately process contract carrier applications. While the Commission did adopt the requirements during the process of a rulemaking proceeding, such requirements were adopted under the Commission's general regulatory authority as reasonable conditions and/or requirements applicable to all contract carrier applicants.

If the Contract Carrier Rules are indeed technically unenforceable as actual "rules and regulations," then the Commission-adopted requirements must remain effective nonetheless when one considers the intent behind section 86-128(3). Such requirements were set forth and adopted by Commission order on November 20, 2001, 16 months prior to LES filing its contract carrier application. The Commission's order clearly indicated that the conditions and requirements contained therein were to apply to contract carriers and were adopted by the Commission only after extensive public comment and hearing. In fact, LES itself participated in the docket and offered little, if any, objection to the proposals contained therein.

LES argues that the five rules being challenged impose a substantive burden and performance obligations that did not exist at the time LES filed its application. That is simply not the case. While the challenged rules may not have been effective at the time LES filed its application, the Legislative directive and the policy behind the Commission's requirements existed and continues to exist, as will be discussed below. If the Commission-adopted requirements are not applied, it leaves the Commission with two undesirable alternatives. The Commission would be left with the choice of either staying the LES application for an indefinite period of time while a rule and regulation proceeding can be concluded or dismissing the application altogether for lack of necessary rules and regulations. Instead, the Commission desires to immediately commence its review and require LES to comply with the same conditions and requirements that other contract carriers will face both now and in the future.

In the end, the Commission believes that it has the necessary and proper authority to place conditions and/or requirements on contract carriers as adopted by this Commission on November 20, 2001, regardless of the fact that the Contract

Carrier Rules may arguably be technically unenforceable as to this application.

The Commission agrees with Lincoln Electric System (LES) that the requirement of the last sentence of Rule 001.02 should not apply. According to the Nebraska Supreme Court, the prohibition against issuing a certificate or a permit to an agency or political subdivision of the state is unconstitutional.<sup>3</sup> Therefore, the last sentence of Rule 001.02 is no longer applicable and will not be considered by the Commission. However, the remaining requirements set forth in Rule 001.02 shall remain effective and will be applied. This interpretation is supported by the fact the LES filed an application for a contract carrier permit.

In regard to the requirements embodied in Rules 002.26A, 003.18, 003.22 and 002.49B1, the Commission is of the opinion that all should apply. The "public interest" standard, which appeared in Rule 002.49B1, will be applied in the review of LES' application. If the application is ultimately approved, LES will be subject to the other requirements, to wit:

A contract carrier's sale or transfer of telecommunications assets or a controlling interest in the company is prohibited without Commission approval and issuance of a new permit;

A contract carrier will be subject to service quality rules for the provisioning of local exchange telecommunication service;

A contract carrier will be limited to one (1) permit under which it may serve no more than five (5) customers; and

(These three requirements, along with the public interest standard, are collectively referred to hereinafter as the "Requirements")

While LES argues that it effectively trumped the Commission's Contract Carrier Rules by filing its application four days prior to the statutory effective date, the Commission cannot disregard its independent statutory responsibility to "Promote fair competition in all Nebraska telecommunications markets in a manner consistent with the federal act." Neb. Rev. Stat. §86-102(5).

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<sup>3</sup> See *In re Application of Lincoln Elec. Sys.*, 265 Neb. 70, 655 N.W.2d 363 (2003)

The Requirements relate to conditions or requirements to which permitted contract carriers are subject, either in the consideration of their applications for permits or in the provision of their service going forward. Such conditions and restrictions were designed to promote "fair" competition and to protect the public once an entity has entered the telecommunications marketplace. If the Commission were to allow LES to provide telecommunications in the marketplace without complying with the same restrictions or conditions, it would clearly create an unfair competitive advantage for LES over other contract carriers. Such a loophole would be contrary to the intent of the Nebraska Legislature in promoting fair competition in all Nebraska telecommunications markets.

According to the Nebraska Legislature, both common and contract carriers in Nebraska should be subject to regulation by the Commission in order to preserve the integrity of a ubiquitous network, to preserve and advance universal service, and to ensure the delivery of essential and emergency telecommunications service. Therefore, it is obvious that regulations and other requirements must be consistent for all like carriers.

For that reason, the Requirements are critical for the Commission to successfully regulate the quality of telecommunications service provided by telecommunications companies. Neb. Rev. Stat. § 86-123(1), states in part, "The Commission shall regulate the **quality of telecommunications service** provided by telecommunications companies." Despite LES' argument to the contrary, the Legislature has clearly given the Commission the necessary statutory authority to regulate the quality of service of telecommunications companies, including contract carriers.

According to Neb. Rev. Stat. § 75-109, "the commission shall regulate and exercise general control as provided by law over all common and contract carriers engaged in transportation of freight or passengers for hire or furnishing telecommunications services for hire in Nebraska intrastate commerce." For example, the Commission, in its exercise of regulation and general control over contract carriers, is entitled to review and approve the transfer of the contract carrier permits it issues. This regulatory authority resides in the Commission irrespective of the applicability or inapplicability of Rule 002.26A. In connection with the exercise of this authority, a determination as to whether the public interest would be served by a proposed transfer is appropriately made by the Commission.

Moreover, if the Commission cannot control who could eventually operate a "permitted" entity, no oversight of quality of service could be maintained as required by the Legislature. To allow one carrier, such as LES, to evade such regulation would have a negative and discriminatory impact on competition in Nebraska.

Furthermore, legislative directive like that contained in Neb. Rev. Stat. § 86-128(3) clearly indicates support for classifying groups of carriers as well as the creation of the specific requirements under which they must operate. To not place some limitation on the number of contracts a "contract" carrier may enter into, clearly creates an indistinguishable line between common and contract carriage. If LES or any contract carrier truly seeks to enter into unlimited contracts, then such carrier should seek a certificate as a "common" carrier. If instead contract carriage is truly what is desired, then some limitation must inherently be placed upon contract carriers in order to distinguish the two.

Finally, in regard to the "public interest" requirement, the Commission believes that public interest is a threshold standard established by the Legislature. According to Neb. Rev. Stat. § 86-126,

Except for requirements established by statute, the commission may limit, remove, or waive regulatory requirements for telecommunications companies when it determines that competition will serve the same purposes as **public interest regulation**. The commission may revoke any waivers it grants or reinstate regulations if such revocation or reinstatement would protect the **public interest** upon a finding that the telecommunications company is restricting market output, impairing customer interest, or engaging in unlawful anticompetitive activity. (Emphasis added.)

The Legislature specifically granted the Commission the authority to consider what requirements should or should not apply when it relates to public interest. The guiding directive is that the Commission must protect the public interest. Accordingly, the Commission has specifically set forth clear standards upon which the Commission will consider public interest. As such, those standards will be utilized by the Commission to evaluate LES' contract carrier application.

Accordingly, the Commission hereby issues a Declaratory Ruling that the Requirements set forth above and contained in the Contract Carrier Rules and adopted by this Commission on November 20, 2001, should apply to the application of Lincoln Electric System for contract carrier permit authority. As such, the Commission will proceed expeditiously with a comprehensive review of the LES application on a timeline similar to what has been previously proposed in this proceeding.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Requirements set forth above and contained in the Contract Carrier Rules should be applied to the application of Lincoln Electric System for contract carrier permit authority.

MADE AND ENTERED at Lincoln, Nebraska, this 19th day of August, 2003.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director